

Tentative Rulings for August 15, 2000
Department 72

There are no tentative rulings for the following cases. The parties should appear at the hearing.

641973-3 *Lyn (Costi) et al. v. Lawrence*

654629-5 *Wright v. Baker*

654637-8 *Ibarra v. Servin*

654661-8 *In re Kevin Lee Gary*

(Tentative Rulings begin at next page)

Tentative Ruling

Re: ***People v. Harlan et al.***
Case Number: 635131-6
Consolidated with cases 635132-4, 635133-2, 635134-0, 635135-7, 635136-5, and 635137-3

Date of Hearing: August 15, 2000 (Dept. 72)

Motion: Compel initial responses to interrogatories, and sanctions

Tentative Ruling:

To grant the Department of Transportation's motion to compel Floyd Harlan, Leola Harlan and Harlan Land Company to provide initial responses to the interrogatories served on February 4, 2000. Defendants to have 10 days to provide responses to the discovery. To grant the Department's request for monetary sanctions.

Floyd Harlan, Leola Harlan and Harlan Land Company have failed to timely respond to the discovery requests. All objections are waived. CCP §2030(k).

Floyd Harlan, Leola Harlan and Harlan Land Company, jointly and severally, to pay sanctions in the amount of \$300.00 to counsel for the Department of Transportation. CCP §2030(k) and §2023. Sanctions to be paid within 30 days of service of the order.

Pursuant to CRC 391(a) and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Re: ***Barajas v. State of California et al.***
Superior Court Case No. 621659-2

Hearing Date: August 15, 2000 (Dept. 72)

Motion: Motion for leave to file a third amended complaint

Tentative Ruling:

To grant plaintiff's motion for leave to file a third amended complaint. The court may grant leave to amend the complaint at any stage of the proceeding. Amendments may be made any time at or before trial "in the furtherance of justice". CCP §473, §576. The decision whether to grant leave to amend is addressed to the sound discretion of the court. However, denial of leave to amend is rarely justified. ***California Casualty General Insurance Co. v. Superior Court*** (1985) 173 Cal.App.3d 274, 284.

The court finds that allowing the proposed amendment will further the strong judicial policy favoring liberal amendments so that all disputed matters between the parties arising from the same incident can be resolved in the same lawsuit. ***Nestle v. Santa Monica*** (1972) 6 Cal.3d 920, 939. The court finds that there is no evidence that the plaintiff has been dilatory in seeking the proposed amendment nor is there any evidence that the defendants have been prejudiced by any delay. ***Hirsa v. Superior Court*** (1981) 118 Cal.App.3d 486, 490, ***Higgins v. DelFaro*** (1981) 123 Cal.App.3d 558, 564-565.

Pursuant to CRC 391(a) and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order. Plaintiff is granted 10 days to file a 3rd amended complaint. All new allegations are to be set in **boldface**.

Tentative Ruling

Re: ***Boyajian et al. v. Westamerica Bancorporation***
Superior Court Case No. 631260-7

Hearing Date: August 15, 2000 (Dept. 72)

Motion: Application to be Admitted Pro Hoc Vice

Tentative Ruling:

To deny John Worth's application to be admitted pro hoc vice without prejudice. Worth must provide proof of service in accordance with CCP §1013a of a copy of the application and of the notice of hearing of the application upon all parties and the State Bar. CRC 983(b). There is no POS in compliance with §1013a showing proper service on the Bar. There is no evidence that the Bar was served with the notice, just the application. Worth's statement that "he caused to be delivered to the Office of the State Bar...a copy of this Application..." is insufficient. See Decl. of Worth, ¶8.

Pursuant to CRC 391(a) and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Re: ***Judy v. Johnson***
Superior Court Case No. 645306-2

Hearing Date: August 15, 2000 (Dept. 72)

Motion: Demurrer to first amended complaint

Tentative Ruling:

To sustain in part, and to overrule in part, with plaintiff being granted 10 days' leave to amend.

A complaint must contain "a statement of facts constituting the cause of action, in ordinary and concise language." (Code of Civ. Proc. §425.10(a).) The ultimate facts which constitute the cause of action should be stated. (*Green v. Palmer* (1860) 15 Cal. 411, 414; *Estate of Bixler* (1924) 194 Cal. 585, 589.) Here, the pleading as a whole does not apprise the defendants of the factual basis of plaintiff's claim. (*Semola v. Sansoucie* (1972) 28 Cal.App.3d 714, 719 [104 Cal.Rptr. 897].)

The running of the statute must appear clearly and affirmatively from the dates alleged in the complaint (*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403 [44 Cal.Rptr.2d 339, 343]), or from documents sought to be judicially noticed. While the existence of any document in a court file may be judicially noticed, the truth of matters asserted in such documents is not necessarily subject to judicial notice. (*Soskinsky v. Grant* (1992) 6 Cal.App.4th 1548 [8 Cal.Rptr.2d 552].)

Pursuant to CRC 391(a) and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order, and the time in which the complaint can be amended will run from service by the clerk of the minute order. Plaintiff is ordered to prepare the second amended complaint showing all new allegations and language in **bold** type.

Tentative Ruling

Re: ***Laticia Washington v. State of California
Department of Corrections, et al.***
Superior Court Case No. 613427-4

Hearing date: 8-15-00 (Dept. 72)

Motion: 1) to compel initial responses to form interrogatories
2) to deem RFA's admitted
3) for monetary sanctions

Tentative Ruling:

To grant defense motions and order plaintiff to provide verified responses without objection to defendant's form interrogatories, set one, within ten days of notice of the order, to deem admitted all matters contained in defendant's request for admissions, set one, and to order plaintiff and her attorney, Juan Falcon & Associates, jointly and severally, to pay monetary sanctions of \$300.00 to the Office of the Attorney General within 30 days of notice of the order.

Pursuant to CRC391(a) and CCP §1019.5, no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling

Re: **Chilton v. McCarthy, et al.**
Superior Court Case No. 618491-5

Hearing Date: August 15, 2000 (Dept. 72)

Motion: Demurrer of Defendant Nationwide Mutual Insurance Company to the 8th Cause of Action of Plaintiff's Third Amended Complaint

Tentative Ruling:

To overrule in part, but to sustain in part without leave to amend. Defendant to file and serve an answer to the Third Amended Complaint within 10 days, except as to the allegations of the 8th Cause of Action.

At the outset, the court finds that plaintiff's opposition was filed egregiously late. (CCP § 1005(b)) Therefore, said opposition was not considered by the court. (CRC 317(d))

To the extent that the demurrer is based on the "uncertainty" of the 8th Cause of Action under CCP § 430.10(f), it is overruled. Nationwide has indicated by its argument that it can reasonably determine what issues must be admitted or denied, or what counts or claims are directed against it. (See discussion at Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2000) at §§ 7:84-86 and ***Khoury v. Maly's of Calif. Inc.*** 91993) 14 Cal.App.4th 612, 616.)

To the extent that the demurrer is based on insufficient allegations that the emotional distress allegedly resulting from Nationwide's conduct was not "severe," it is overruled. Plaintiff has alleged that several "highly unpleasant mental reactions" occurred as the result of Nationwide's alleged conduct. The specific reactions or symptoms alleged may very well indicate that "severe" emotional distress was suffered. (***Fletcher v. Western National Life Ins. Co.*** (1970) 10 Cal.App.3d 376, 397.) Further, although Nationwide recites applicable law, it does not argue, demonstrate, or even discuss, whether plaintiff's specific allegations constitute "severe" emotional distress.

However, the court finds that the 8th Cause of Action fails to sufficiently allege that the conduct of Nationwide was "extreme and outrageous." Such conduct is an essential element of a claim for intentional infliction of emotional distress ("IIED"), and if insufficiently alleged, the claim must fail. (***Cervantez v. J.C. Penney Co.*** (1979) 24 Cal.3d 579, 592.) The court finds that none of the alleged conduct of

Nationwide, in its investigation and reporting of a suspected fraudulent claim, went beyond “all possible bounds of decency so as to be regarded as atrocious and utterly intolerable in a civilized society.” (See BAJI (8th Ed.), BAJI No.12.74, and ***Cervantez v. J.C. Penney Co., supra***, at p. 593.) These allegations, then, will not support a cause of action for IIED. On this ground, the demurrer is sustained, and plaintiff will not be allowed leave to amend. As Nationwide has argued, the allegations of this claim of the Third Amended Complaint are essentially the same as those made in the Second Amended Complaint. Plaintiff has now simply added additional detail. In this situation, the burden was on plaintiff to show in what manner he could amend the Third Amended Complaint and how such amendment would change the legal effect of the pleading. (See Weil & Brown, *supra*, at § 7:130, and cases cited.) Plaintiff has failed to make this showing. Thus, on this basis, and on the basis that the allegations of the 8th Cause of Action fail to state facts sufficient to constitute a cause of action against Nationwide (CCP § 430.10(e)), it is proper to sustain the demurrer without leave to amend.

Pursuant to CRC 391(a) and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order, and the time in which the Third Amended Complaint can be answered by defendant Nationwide will run from service by the clerk of the minute order.